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No. 00-491

Supreme Court, U.S.
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In The

# Supreme Court of the United States

STEVENS CREEK QUARRY, INC.,

*Petitioner,*

vs.

SANTA CLARA COUNTY PLANNING COMMISSION, THOMAS TANNER, CHARLES REED, PAT SAUSEDO, THOMAS KRUSE, MOHINDER MANN, BRENT VENTURA, NICOLAS HOLGUIN, SANTA CLARA COUNTY BOARD OF SUPERVISORS, DIANNE MCKENNA, MICHAEL HONDA, BLANCA ALVARADO, RON GONZALES and JAMES T. BEALL, JR.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Stevens Creek Quarry stated a Fourteenth Amendment substantive due process violation by alleging that its property rights were violated by "government coercion."

## PARTIES

Stevens Creek Quarry, Inc., is the petitioner here and the plaintiff below. Respondents/defendants are: the Santa Clara County Planning Commission; Santa Clara County Planning Commissioners Thomas Tanner, Charles Reed, Pat Sausedo, Mohinder Mann, Brent Ventura, and Nicolas Holguin; Santa Clara County Board of Supervisors; and Santa Clara County Board of Supervisors members Dianne McKenna, Michael Honda, Blanca Alvarado, Ron Gonzales, and James T. Beall, Jr.

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## OPINIONS BELOW

On December 14, 1998, the District Court granted defendants' motion to dismiss the Quarry's second amended complaint with prejudice. On April 28, 2000, the Ninth Circuit issued a Memorandum affirming the ruling by the District Court. The Quarry does not accurately quote the actual Ninth Circuit Memorandum filed on April 28, 2000. Rather, the Quarry incorporates the changes subsequently ordered by the Ninth Circuit on June 29, 2000. *See* Appendix to this brief for an accurate presentation of the original Memorandum.

The Quarry filed a petition for rehearing or *en banc* review. On June 29, 2000, the Ninth Circuit issued an Order Amending Memorandum Disposition in which it denied the Quarry's requests and amended its original Memorandum. The Quarry accurately quotes the Order Amending Memorandum Disposition.

## INTRODUCTION

The District Court and the Ninth Circuit correctly ruled that appellant Stevens Creek Quarry, Inc. ("the Quarry"), has failed to state a Fourteenth Amendment substantive due process claim. There is no issue warranting review by this Court.

The precise basis for the Quarry's request for review is unclear. The Quarry agrees that past Ninth Circuit decisions regarding substantive due process have been appropriate and proper. It appears to contend that the Ninth Circuit failed to acknowledge that the Quarry's

claim of "outrageous conduct amounting to extortion" somehow comprises a substantive due process claim under the Fourteenth Amendment. However, the Quarry cites no authority recognizing the existence of that purported right.

The Quarry seems to advance a second ground for review that is largely set forth in a footnote. This argument appears to be that a conflict exists among the lower courts. The Quarry cites no decision that conflicts with the Ninth Circuit's Memorandum. Finally, the Quarry claims that review is proper based on *Village of Willowbrook v. Olech*, 528 U.S. 1073, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000), an opinion relating to an equal protection, not substantive due process, claim. In addition, the Quarry mischaracterizes cases, the proceedings, and the Ninth Circuit rulings in its petition.

The petition for certiorari should be denied.

## STATEMENT OF THE CASE

The Quarry operates a mining and equipment rental business. The Quarry claims that it has a right to conduct these operations based on: (1) the permit for the front portion of the property (Parcel A), and (2) the "nonconforming 'grandfathered' right" on the back portion of the property (Parcel B). In 1950, Santa Clara County first issued a use permit for the front portion of the Quarry's property. In 1984, 1985, 1990, and 1995, the County renewed the use permit. Every time the permit was renewed, the permit was also modified.

Under local ordinances, the County Planning Commission may revoke or modify a use permit under certain circumstances, including if it finds violations of use permit conditions or a "nuisance or detriment to the public health or safety" arising from an activity allowed by the use permit. The Planning Commission may modify the conditions of or add new conditions to use permits following a duly noticed hearing.

According to the use permit issued to the Quarry on February 18, 1995, a failure to comply with all the conditions of the permit "will render the permit subject to revocation." In response to community complaints that the Quarry had violated a number of permit conditions, the Planning Commission conducted a series of hearings during a nine month period. The Planning Commission encouraged a "Good Neighbor Committee" to work with the Quarry to achieve a resolution without the need for formal County intervention. The Planning Commission ultimately concluded that the non-conforming use of the back portion of the property (Parcel B) had expanded beyond the historic scope and the use permit applied to both the back portion (Parcel B) and the front portion (Parcel A) of the property.

The Quarry appealed the determinations of the Planning Commission to the Santa Clara County Board of Supervisors. On October 29, 1996, and September 10, 1996, the Board of Supervisors held public hearings to review the Planning Commission's decision on a *de novo* basis, as required by local ordinance. The Board of Supervisors also received public testimony.

On December 17, 1996, the Board of Supervisors issued its findings in a formal resolution. The Board of Supervisors determined that the Quarry was not complying with a number of permit conditions, including hours of operation, truck, traffic, speeding, spillage on the roads, and noise and vibration levels. The Board concluded that these violations constituted a nuisance and detriment to the health and safety of the community. The Board of Supervisors determined that it had received "substantial evidence" that the quarrying operations had significantly expanded beyond their historic scope and scale, to the detriment of "public health and safety." It made minor alternations to the use permit conditions. It also asked County staff to analyze and to report on the status of quarrying activities on Parcel B.

The Quarry filed suit in federal court claiming that Santa Clara County had violated its procedural and substantive due process rights under the Fourteenth Amendment. The District Court dismissed the Quarry's second amended complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Ninth Circuit affirmed the District Court ruling. The Quarry appeals only the ruling dismissing the substantive due process claim. The Quarry also filed suit in California state court challenging the County's actions on similar grounds. The trial court ruled for the County and the Quarry has appealed that decision to the California Court of Appeal.

## REASONS FOR DENYING THE PETITION

### I. THE COURT PROPERLY HELD THAT THE QUARRY FAILED TO STATE A SUBSTANTIVE DUE PROCESS CLAIM

The Quarry contends that two cases that were not cited in the Ninth Circuit Memorandum – *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) and *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) – "should be viewed as inapplicable to a situation such as the one presented in this case, where there is no explicit constitutional provision pertaining to the conduct which is asserted to be constitutionally impermissible." Petition at 3. The Quarry argues that these decisions "should not be viewed as providing a justification for converting a plaintiff's claim into something other than what was asserted." *Id.* at 3-4.

The Quarry agrees that the Ninth Circuit cases *Buckles v. King County*, 191 F.3d 1127, 1138 (9th Cir. 1999); *Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir. 1997); and *Armendariz v. Penman*, 75 F.3d 1311, 1320 (9th Cir. 1996) were properly decided. Petition at 6. It characterizes these three decisions as holding that substantive due process claims were "essentially taking claims and were rightfully disposed of as such." *Id.* The Quarry contends that its claim is different, although it fails to explain the basis for this conclusory assertion. Because the Ninth Circuit Memorandum is entirely consistent with these three cases that the Quarry states were properly decided, review of this petition should be denied.

In *Armendariz v. Penman*, the Court explained that "the use of substantive due process to extend constitutional protection to economic and property rights has been largely discredited." It continued:

> Rather, recent jurisprudence restricts the reach of the protections of substantive due process primarily to liberties "deeply rooted in this nation's history and tradition." *Moore* [*v. City of East Cleveland*], 431 U.S. at 503, 97 S.Ct. at 1937. Thus, the Fourteenth Amendment protects against a State's interferences with "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," as well as with an individual's bodily integrity.

*Armendariz v. Penman*, 75 F.3d at 1319 (citations omitted). *See Albright v. Oliver*, 510 U.S. at 273 ("The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity"). The very cases cited by the Quarry confirm the reluctance to analyze land use claims under the general substantive due process clause. They hold that such claims are more appropriately examined as Fifth Amendment claims under the Takings Clause. *See Buckles v. King County*, 191 F.3d at 1138; *Macri v. King*, 126 F.3d at 1128-29; *Armendariz v. Penman*, 75 F.3d at 1320. The Quarry is attempting to do precisely what the *Macri* opinion says it cannot do: "Appellants, however, cannot sidestep *Armendariz* by recharacterizing their claim as lying solely in substantive due process." *Macri*, 126 F.3d at 1129.

The Quarry incorrectly posits that "the Ninth Circuit in this case has indicated that there can never be a valid

substantive due process claim in the land use context and that all such claims are actually takings claims and should be pled as such." *Id.* at 9. The Quarry misconstrues the Ninth Circuit's Memorandum. Rather, the Ninth Circuit merely held that the Quarry's characterization of its particular charge of "outrageous conduct" based on the modification of its use permit as a substantive due process violation "is akin to a takings claim." Petition at 17a. The Ninth Circuit Memorandum explained that the quarry's claim was insufficient because "the Quarry never attempted to show that its operations under the modified use permit would no longer be economically feasible." *See* Appendix at App. 1. This ruling is entirely consistent with the cases the Quarry argues were properly decided.

Toward the end of its petition, the Quarry suggests that review should be granted by this Court to "clarify" the existence of "non-economic fundamental rights" so as to "avoid ever increasing confusion" regarding substantive due process claims in the land use context. Petition at 9. This argument is puzzling. The Quarry cites no Circuit that recognizes these unidentified "non-economic fundamental rights" under the substantive due process clause and neglects to describe the specific nature of any existing "confusion." The Quarry refers to "the vast number, indeed thousands, of land-use decisions" issued every year. *Id.* at 10. However, it fails to cite a single decision that raises the unusual argument it asks this Court to review. The reason is clear: no such jurisprudence exists.

## II. THE PETITION SHOULD BE DENIED BECAUSE NO CONFLICT EXISTS

It is difficult to discern the precise nature of the conflict or inconsistency among decisions that the Quarry believes exists. The Quarry asserts that the Ninth Circuit's position in this case "is inconsistent" with the rulings that "property rights can be implicated, and violated, in the land use context." Petition at 6. At the same time, the Quarry fails to explain the meaning or basis of this assertion.

It is only in a footnote that the Quarry addresses the purported conflict among the Circuits. In note 4, it argues that "the Ninth Circuit's position that the Takings Clause preempts all substantive due process claims contradicts the position of other circuits that have considered the issue." Petition at 6, n.4. The Quarry mischaracterizes the Ninth Circuit ruling. The Ninth Circuit Memorandum does not state that property rights can never be implicated or violated in the land use context. Again, the Memorandum was limited to whether the Quarry had stated a substantive due process claim. The decision merely indicated that the allegations made by the Quarry were more akin to a takings claim.

Even if the Quarry had accurately portrayed the Court's decision, the cases the Quarry cites in note 4 do not conflict with the Ninth Circuit Memorandum. For example, the Quarry cites *Johns Corporation v. City of Houston*, 214 F.3d 573 (5th Cir. 2000). In that case, property owners claimed that the City of Houston violated their Fifth, Eighth, and Fourteenth Amendment rights when it impeded their efforts to rehabilitate a building

and issued demolition orders. The Court held that the complaint stated a substantive due process claim by alleging that some city ordinances were unconstitutionally vague, both facially and as applied. *Johns Corporation,* 214 F.3d at 585. The Quarry makes no such allegation.

The basis for the Quarry's reliance on *Bickerstaff Clay Products v. Harris County,* 89 F.3d 1481, 1490, n.16 (11th Cir. 1996) is also obscure. The Eleventh Circuit explained that:

> The substantive component of the Due Process Clause prohibits a government entity from applying to a property a zoning classification that bears no relationship to 'public health, safety, morals, or general welfare' and thus is beyond the government's police power. *See Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed 303 (1926).

*Bickerstaff,* 89 F.3d at 1489. Bickerstaff argued that the zoning classification applied to his property comprised an improper exercise of police power and made the property useless. The Court concluded that because Bickerstaff's due process and Fifth Amendment takings claims were identical in scope, the plaintiff had stated a Fifth Amendment but not a Fourteenth Amendment claim. *Bickerstaff,* 89 F.3d at 1490. The Eleventh Circuit's decision thus is consistent with the Ninth Circuit Memorandum here. The Quarry also cites *Tri County Industries, Inc. v. District of Columbia,* 104 F.3d 455 (C.A.D.C. 1997). There, a builder sued the District of Columbia when its building permit was suspended. The court noted that while the basis for the substantive due process was "not

crystal clear," the builder's substantive due process claim was properly dismissed "either for want of ripeness or on the merits." *Tri County Industries*, 104 F.3d at 417.

The Quarry continues that the Memorandum of Decision is "at odds" with *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1700, 140 L.Ed.2d 1043 (1998). Petition at 7, n.4. Again, the Quarry's argument is unclear. The factual context of the *County of Sacramento v. Lewis* was very different from that before this Court. In *Lewis*, a passenger on a motorcycle driven by a suspect was killed in a high speed police chase. The Supreme Court concluded that there was no substantive due process violation. The Quarry cites *United States v. Lanier*, 520 U.S. 259, 272, n.7, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) in the same footnote. That decision involved the criminal conviction of a state court judge for sexual assault. The Supreme Court remanded the case because the Court of appeal had applied an incorrect standard when it examined the "fair warning requirement." No such issue is before this Court.

## III. THE QUARRY'S CITATION TO AN EQUAL PROTECTION DECISION FAILS TO PRESENT A BASIS FOR REVIEW

The Quarry's reliance upon *Village of Willowbrook v. Olech*, 528 U.S. 1073, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000), is misplaced. Petition at 7. There, the Supreme Court recognized an equal protection violation where village authorities had treated one property owner differently than all other property owners. That decision is inapposite to the determination whether the Quarry stated a substantive due process claim. The Quarry has

never asserted an equal protection violation in this case. Nor has it alleged disparate treatment.

The Quarry continues that "[t]he distinction between the equal protection claim advanced in *Olech* and the substantive due process claim advanced in this case is one without any particular significance since both assertions involved the alleged denial of a fundamental constitutional right." Petition at 8. The Quarry fails to explain the basis for this position.

The Ninth Circuit's ruling in this case was narrow: the Quarry failed to state a Fourteenth Amendment substantive due process claim upon which relief may be based. The Quarry fails to explain how *Village of Willowbrook v. Olech* demonstrates that the complaint states a substantive due process violation under the Fourteenth Amendment.

## CONCLUSION

Respondents Santa Clara County Planning Commission, *et al.*, respectfully request that this Court deny the Quarry's petition for writ of certiorari for the reasons discussed above.

Respectfully submitted,

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## APPENDIX

The original Memorandum by the Ninth Circuit filed on April 28, 2000 reads:

STEVENS CREEK QUARRY, INCORPORATED

Plaintiff-Appellant,

v.

SANTA CLARA COUNTY PLANNING COMMISSION, THOMAS TANNER, CHARLES REED, PAT SAUSEDO; MOHINDER MANN; BRENT VENTURA; NICOLAS HOLGUIN; DIANNE McKENNA; MICHAEL HONDA; BLANCA ALVARADO; RON GONZALES; JAMES T. BEALL, JR.,

Defendants-Appellees.

Before: SNEED, SCHROEDER and TROTT, Circuit Judges.

## MEMORANDUM

Stevens Creek Quarry, Inc. ("Quarry") appeals the district court's order granting Santa Clara County Planning Commission et al.'s (collectively "County") motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The Quarry argues that, with regard to its claims that the County violated its procedural and substantive due process rights, the district court erred in concluding that the Quarry failed to state a claim upon which relief can be granted. We have jurisdiction pursuant to 28 U.S.C. §1291, and we AFFIRM.

A district court's order granting a motion to dismiss for failure to state a claim under rule 12(b)(6) is reviewed

de novo. *Steckman v. Hart Brewing, Inc.*, 153 F. 3d 1293, 1295 (9th Cir. 1998). For purposes of evaluating a motion to dismiss, we take as true all allegations of material fact stated in the complaint and construe them in the light most favorable to the nonmoving party. *Warshaw v. Xoma Corp.*, 74 F.3d 355, 957 (9th Cir. 1996).

The Quarry's first argument is that the County violated its procedural due process rights by modifying the Quarry's use permit. To prevail on a 42 U.S.C. §1983 claim based on a violation of procedural due process, a plaintiff must establish (1) a liberty or property interest protected by the constitution, (2) a deprivation of that interest by the government, and (3) the lack of process. *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993). We assume that the Quarry had a protected property interest, *see Lyng v. Payne*, 476 U.S. 926, 942 (1986), and, therefore, the only question is whether the County provided the Quarry with sufficient process. In this case, the evidence shows that as early as September 1995, the Quarry had notice of the charges against it – that it was violating the conditions of the use permit related to hours of operation, dust, noise, and lighting. In addition, the County continued the hearings five times, thereby giving the Quarry several opportunities to be heard. Accordingly, the Quarry received all the process that was due. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

The Quarry also contends that the County violated "its substantive due process rights" when it modified the use permit. To establish a violation of substantive due process, a plaintiff must prove that the challenged government action either (1) violated a fundamental right

and is not narrowly tailored to serve a compelling state interest, or (2) violated an ordinary, nonfundamental, liberty interest and does not rationally advance some legitimate governmental purpose. *See Reno v. Flores*, 507 U.S. 292, 301-06 (1993). Here, the Quarry never attempted to show that its operations under the modified use permit would no longer be economically feasible. Thus, even construing the allegations of the complaint in the light most favorable to the Quarry, the Quarry still fails to state a claim for violation of substantive due process.

**AFFIRMED.**